Supreme Court, U.S.
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In The

Supreme Court of the United States

OCTOBER TERM 1998

RINA MOSCARIELLO,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED ON REVIEW

Whether the trial judge erred by double-counting and increasing petitioner's sentencing range by two levels pursuant to U.S.S.G. §2F1.1(b)(3)(B) when she had not violated any judicial or administrative order as defined by this section of the Sentencing Guidelines.

STATUTORY PROVISION INVOLVED

The offense level used to calculate petitioner's sentence was enhanced pursuant to U.S.S.G. §2F1.1(b)(3)(B) which provides that "[i]f the offense involved... [a] violation of any judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines, increase by 2 levels. If the resulting offense level is less than level 10 , increase to level 10." U.S.S.G. §2F1.1(b)(3)(B)

STATEMENT OF THE BASIS FOR JURISDICTION

Jurisdiction of the Supreme Court to review the order in question on a writ of certiorari is conferred by 28 U.S.C. §1254. Jurisdiction the United States Court of Appeals for the Third Circuit was conferred by 28 U.S.C. §1291 and 18 U.S.C. §3742(a). The Court of Appeals denied petition for rehearing on September 22, 1998. The appellate mandate was issued on September 30, 1998.

STATEMENT OF THE CASE

On April 7, 1997, after a three-day jury trial, petitioner, Rina Moscariello, was found guilty of violating the bankruptcy fraud statute, 18 U.S.C. §152(1) which prohibits "knowingly and fraudulently" concealing from creditors "property belonging to the estate of the debtor."

Sentencing was held on October 2, 1997. The trial judge granted defendant's motion for downward departure based on her diminished mental capacity which affected her ability to form the necessary element of criminal intent to commit fraud. Then, over defense objections, the trial judge enhanced petitioner's guideline computation by two levels for violation of a judicial order or process. Petitioner's contention is that she had not violated "any judicial or administrative order" and that the sentencing court therefore erred by increasing her offense level pursuant to U.S.S.G. §2F1.1(b)(3)(B).

Petitioner received a sentence of four months' imprisonment to be followed by three years of supervised release with conditions. Petitioner has been free on bail and thus has not yet begun to serve her sentence.

REASONS FOR ALLOWANCE OF WRIT

The meaning and application of U.S.S.G. §2F1.1(b)(3)(B) is an important matter. Decisions of United States Courts of Appeal are presently in conflict on this specific issue.

A. Bankruptcy proceedings are not a per se, automatic violation of a "process not addressed elsewhere in the guidelines."

Most courts that have faced the issue have held that bankruptcy proceedings are a "process not addressed elsewhere in the guidelines," and that a sentencing court therefore may enhance the sentence of a defendant convicted of concealing assets during bankruptcy proceedings pursuant to U.S.S.G. §2F1.1(b)(3)(B) even if the defendant did not violate a specific "judicial or administrative order." *See, e.g., United States v. Guthrie,* 144 F.3d 1006, 1008 (6th Cir. 1998); *United States v. Welch,* 103 F.3d 906, 908 (9th Cir. 1996); *United States v. Messner,* 107 F.3d 1448, 1457 (10th Cir. 1997); *United States v. Michalek*, 54 F.3d 325, 331 (7th Cir. 1995); *United States v. Lloyd*, 947 F.2d 339, 340 (8th Cir. 1991). Petitioner now contends that this approach is incorrect.

B. Sentence enhancement pursuant to §2F1.1(b) is not appropriate in all cases of bankruptcy fraud involving concealment of assets.

In *United States v. Spencer*, 129 F.3d 246 (2d Cir. 1997), *cert. denied,* 118 S.Ct. 1388, 140 L.Ed.2d 648, 98 USLW 3604 (U.S. 1998), the court resolved the §2F1.1(b)(3)(B)issue on other grounds stating that the court "need not address the difficult issue of whether... violation of bankruptcy orders also suffices to support an increase under" U.S.S.G. §2F1.1(b) (3)(B).

Other circuit courts have questioned the rationale employed in cases which hold that "abuse" of a bankruptcy proceeding itself constitutes per se "violation of judicial process" *United States v. Shadduck*, 112 F.2d 523, 529 (1st Cir. 1997). Cf. *United States v. Carrozzella*, 105 F3rd 795, 799-802 (2nd Cir. 1997)

The enhancement that petitioner received "derogated the very structure of the Sentencing Guidelines, whereby the core crime corresponds to the base offense level and the enhancements correspond to the particular facts of the crime as it was committed by defendant." *United States v. Michalek*, 54 F.3d 325, 336 (separate opinion).

C. Petitioner is entitled to statutory construction under to the rule of lenity.

The rule of lenity applies to construction of the guidelines. *United States v. Tabaka*, 982 F.2d 100, 103 (3d Cir. 1992). Therefore any ambiguity in the Commission's use of: (1) "violation"; (2) "judicial"; (3) "order"; (4) "process"; and (5) "not addressed elsewhere in the guidelines" must be resolved in favor of petitioner.

D. The downward departure for diminished capacity under 5K.2.13 is further reason for not increasing petitioner's sentence under U.S.S.G. §2F1.1(b)(3)(B).

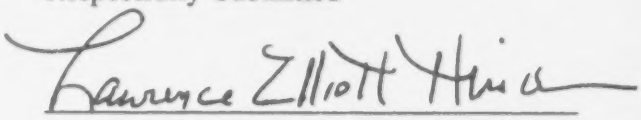
Petitioner's diminished capacity would bear not only on the elements of the core crime, but on any intentional "violation" corresponding to the particular facts of the commission of the crime for enhancement purposes under U.S.S.G. §2F1.1(b)(3)(B).

CONCLUSION

Petitioner's challenge to the sentencing court's application of the Sentencing Guidelines raises a substantial legal issue "likely to result in... a sentence that does not include a term of imprisonment, or... a reduced sentence." 18 U.S.C. §3143 (b)(1)(B)(iii)(iv).

For the foregoing reasons, this honorable court should grant the writ of certiorari.

Respectfully Submitted



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Appendix to Petition

1. Third Circuit Memorandum Opinion filed June 9, 1998.

2. Order denying petition for rehearing dated September 22, 1998.

NOT FOR PUBLICATION

No. 97-1852

UNITED STATES OF AMERICA,

v.

RINA MOSCARIELLO,

Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Criminal No. 96-cr-00282-1)
District Judge: Honorable Marjorie O. Rendell

Submitted Under Third Circuit LAR 34.1(a)
Friday, May 22, 1998

BEFORE: ROTH, MCKEE
and GARTH, Circuit Judges

(Opinion filed: June 9, 1998)

MEMORANDUM OPINION OF THE COURT

GARTH, Circuit Judge:

In this appeal, Rina Moscariello appeals her conviction and sentence in a criminal case. We affirm.

I.

Rina Moscariello is the sole owner of a women's clothing company named Rina di Montella, Ltd. ("the company," "the debtor"). On October 14, 1992 the company filed for Chapter 11 in the Bankruptcy Court for the Eastern District of Pennsylvania. The company was allowed to remain in possession of its assets and to continue operating as a "debtor-in-possession." One of the requirements of a debtor-in-possession is that all funds that belong to the debtor must be deposited in special debtor-in-possession bank accounts (so-called "DIP accounts") so that all debtor assets can be tracked and preserved. As part of the bankruptcy court proceedings, the company and its creditors entered into three consecutive cash collateral stipulations, in which creditors agreed to allow the company to use company assets according to weekly budgets in order to allow the company to function during the period of the stipulation. See, e.g., App. 151-58. The stipulations were agreed to by the debtor-company and its creditors, and then approved by the bankruptcy court; their effective time period lasted from roughly October 24, 1992 to January 29, 1993. App. 155-57. The company's Chapter 11 case was dismissed on March 24, 1993, and the bankruptcy court closed the case on April 1, 1993. See App. 569 (bankruptcy court docket sheet).

On June 27, 1996, a grand jury in the Eastern District returned an eleven-count indictment charging Moscariello with having concealed bankruptcy estate assets in violation of 18 U.S.C. § 152(1). App. 9-26. According to the indictment, Moscariello had committed this crime by depositing checks to the company *in non-DIP accounts* between October 1992 and April 1993. In other words, she had tried to evade the company's creditors by concealing the company's assets. On April 4, 1997, the jury found Moscariello guilty on ten counts and hung on the last (Count 6), which was later dismissed.

On October 2, 1997, the district court sentenced Moscariello to four months in prison plus three years of supervised release, in addition to restitution in the amount of $66,967 and a $500 special assessment. Among the deviations from the guidelines, the district court decided to depart upwards two offense levels under U.S.S.G. 2F1.1(b)(3)(B), which says that a district court judge should depart upwards if the violative

offense involved "violation of any judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines." The district court reasoned that the cash collateral stipulations that had been approved by the bankruptcy court were "judicial orders" that had been violated by Moscariello. Further, although the period of the stipulation ended on January 29, 1993, and some of Moscariello's crimes had been committed after that date, the district court ruled that it was understood that after January 29, 1993 the debtor would have no right to use the funds. This, the court "read into [the stipulations ending January 29, 1993] a continuing order...[to the] effect basically that the cash collateral was not to be used." The district court reasoned:

> [R]egardless of the expiration of the permission to use cash collateral within limits, I believe this order had the effect of continuing to prohibit the use of cash collateral under certain circumstances, which circumstances did occur here in that this case was dismissed and during that interim period I think the debtor was put on notice while a dismissal was pending and while the case was ongoing cash collateral was not to be used.
>
> It was deposited in personal accounts and, as far as I'm concerned, that is a prohibited use, prohibited by the Bankruptcy Code, reinforced by this order. So perhaps this is an unusual situation, am I saying it was an order, am I saying it was process? I'm saying the...bankruptcy fact situation we have here was such that calling on either the concept of prior order or judicial process, under the code, I believe this conduct fits within it.

Add C to Blue Br, 10/2/97

II.

Moscariello raises three issues in this appeal. First, she argues that the evidence is insufficient to sustain the jury verdict. Second, she claims that the district court abused its discretion in rejecting a jury instruction on "freelancing." Third, she claims that the district court erred during sentencing by enhancing her offense level by two points under U.S.S.G § 2F1.1(b)(3)(B). We consider each contention in turn.

A.

Moscariello first argues that the evidence at trial could not establish beyond a reasonable doubt that she concealed property of the bankruptcy

estate with intent to defraud its creditors. Under the relevant statute, the government had the burden of proving that Moscariello "knowingly and fraudulently" concealed from creditors of a Chapter 11 debtor "any property belonging to the estate of the debtor." 18 U.S.C § 152(1)(1988). Moscariello claims that the evidence was insufficient to establish that the deposited checks were "property" belonging to the debtor; that Moscariello knew this and intended to defraud the creditors; that by depositing the checks into non-DIP accounts, the property was concealed, and that ten of the checks were concealed during the pendency of the bankruptcy proceedings. Blue Br. at 25.

We examine the evidence in the light most favorable to the government, and ask only whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. Coleman, 862 F.2d 455, 460 (3d Cir. 1988) (emphasis in original). Viewing the evidence with this lens, we answer this question in the affirmative. All of the checks were made out to the debtor in one form or the other; some even had information concerning the debtor's address. See, e.g., App 256, 343, 365-67. Certainly, a rational factfinder could conclude that checks made out to a company are the property of that company. Moscariello's intent to defraud her creditors was established by the fact that she deposited the checks in non-DIP accounts, after having been through the bankruptcy proceedings in which she agreed to her creditors' demands that she not do so. That Moscariello testified that she had no such intent is irrelevant, as it is not per se irrational to reject a defendant's statement that she is innocent of the charged crime. There was also evidence that Moscariello concealed the property, as she knew of her duty to deposit the assets in only DIP accounts, and yet failed to do so. Finally, Moscariello's view that some of the checks could not have been concealed during the bankruptcy is unsupportable in light of the dates of the checks and the records kept concerning when they were deposited. While a rational fact finder could have agreed with Moscariello that some of the checks were not concealed during the pendency of the bankruptcy proceedings, it was not irrational to conclude otherwise.

B.

The second issue raised by Moscariello is whether the district court erred in refusing Moscariello's requests for jury charges on "freelancing." We review for abuse of discretion. See United States v. Santos, 932 F.2d 244, 247 (3d Cir. 1991).

It was Moscariello's theory at trial that the checks deposited in

non-DIP accounts were not the debtor's property, but rather Moscariello's own property, earned by freelance work performed outside of the debtor's business. Accordingly, Moscariello asked the court to charge the jury that "it was perfectly legal for the defendant to conduct business for her account. She was under no obligation to work solely on behalf of the bankrupt company." App. 26. Citing to United States v. Mathews, 485 U.S. 58, 63 (1988) and United States v. Paolello, 951 F.2d 537, 540-42 (3d Cir. 1991), Moscariello claims that the district court abused its discretion by refusing to allow her to present a valid defense theory.

Moscariello's argument is meritless. Her "freelancing" theory is not an affirmative defense, but rather a part of her core argument as to why the government had not proven its case beyond a reasonable doubt. In other words, Moscariello's "freelancing" argument attacks the required offense element that the property belong to the debtor. Because the court had already instructed the jury on this element, there was no need to add additional commentary on it. Accordingly, the district court's decision not to accept the instruction was not an abuse of discretion.

C.

Moscariello's third argument is that the district court erred in departing upwards on the grounds that Moscariello's acts violated U.S.S.G. § 2F1.1(b)(3)(B). This section states:

If the offense involved...violation of any judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines, increase by 2 levels.

The commentary relevant to this section says the following:

> Subsection (b)(3)(B) provides an adjustment for violation of any judicial or administrative order, injunction, decree, or process. If it is established that an entity the defendant controlled was a party to the prior proceeding, and the defendant had knowledge of the prior decree or order, this provision applies even if the defendant was not a specifically named party in that prior case. For example, a defendant whose business was previously enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product, would be subject to this provision. This subsection does not apply to conduct addressed elsewhere in the guidelines; e.g., a

> violation of a condition of release (addressed in S 2J1.7 (Offense Committed While On Release)) or a violation of probation (addressed in S 4A1.1 (Criminal History Category)).

The district court applied this section because it reasoned that Moscariello had violated the cash stipulations that had been approved by the bankruptcy court. See supra 2-3.

Moscariello argues that she has not violated any "judicial order" because 1) her act of hiding funds did not actually violate the stipulation, Blur Br. at 44; 2) the relevant guideline applies only when the criminal conduct was enjoined by a judicial or administrative "prior proceeding" that punished prior similar conduct, Blue Br. at 43-44; and 3) only a small portion of her conduct occurred during the time that the stipulation was in effect, Blue Br. at 45.

Moscariello is incorrect. First, her view that the hiding of the funds did not actually violate the stipulation is unsupportable in light of the fact that the stipulation says that "[a]ll cash collateral received by debtor with respect to the...collateral shall be immediately deposited by the debtor in the accounts... Debtor agrees to use cash collateral only for the specific purposes and in the amount set forth in the budget prepared." App. 154. Ms. Moscariello clearly violated this term by depositing checks for the debtor in her own accounts, and using that money for other purposes.

As for Moscariello's second argument, that there must have been a prior proceeding that already punished the prohibited conduct, this is not supported by the Guidelines or the case law interpreting it. Moscariello is correct that the commentary to the guideline poses an example of the application of this section and mentions a "prior proceeding"; however, there is nothing to the commentary that suggests that such a prior proceeding that already proscribed such conduct in a punishment form is a prerequisite. The circuits that have looked at this question are unanimous that fraud and concealment relating to bankruptcy concerns triggers U.S.S.G. 2F1.1(b)(3)(B), often without regard to whether or not a specific order was actually violated. See United States v. Gunderson, 55 F.3d 1328, 1332 (7th Cir. 1995) (violation of bankruptcy court stipulation triggered guideline enhancement); United States v. Bellew, 35 F.3d 518, 521 (11th Cir 1994) (same); United States v. Saacks, 131 F.3d 540 (5th Cir. 1997) (defendant convicted of bankruptcy fraud automatically triggers U.S.S.G. 2F1.1(b)(3)(B) because bankruptcy fraud inherently abuses the judicial process); United States v. Michalek, 54 F.3d 325 (7th Cir. 1995)

(same); United States v. Lloyd, 947 F.2d 339, 340 (8th Cir. 1991) (same); United States v. Welch, 103 F.3d 906 (9th Cir. 1996) (same). Moscariello relies mostly on United States v. Shadduck, 112 F.3d 523 (1st Cir. 1997) (Cyr, J.), in which the First Circuit held that violation of a bankruptcy rule or the submission of a falsified form does not trigger the enhancement. See id. at 529. The Shadduck court reasoned that the enhancement was only triggered when a person violated an order specifically proscribing the actual conduct. Id. However, this construction is completely satisfied here, as Moscariello clearly violated the cash stipulations.

Finally, Moscariello's view that the enhancement should not apply because only some of the conduct alleged occurred during the period of the cash stipulations is unavailing. As an initial matter, most of the courts that have looked at the matter have held that fraud in relation to the affairs of the bankruptcy court is enough, even absent violations of a specific order. However, more important is the fact that the Guideline does not require that all of the conduct that constitutes the relevant offense be in violation or an order; rather, it requires only that the offense violated any judicial or administrative order, injunction decree, or process. As we see it, that requirement is satisfied when, as here, part of the conduct constituting the offense is in direct contravention to an order issued by the bankruptcy court.

III.

Accordingly, the order of the district court dated October 9, 1997 will be affirmed.

TO THE CLERK:

Please file the foregoing opinion.

GARTH

Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-1852

UNITED STATES OF AMERICA

v.

RINA MOSCARIELLO,

Appellant.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Criminal Action No. 96-cr-00282-1)

Submitted on May 22, 1998

Before: BECKER, Chief Judge, SLOVITER, STAPLETON, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH and MCKEE, Circuit Judges

ORDER

The petition for rehearing in hand filed by appellant, Rina Moscariello, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

ROTH

Circuit Judge

Dated: September 22, 1998